Supreme Court of the United States.

No. 221.—October Term, 1901.

S. D. Hatfield and Nancy C. Rutherford, Appellants, *vs.* Henry C. King. } Appeal from the Circuit Court of the United States for the District of West Virginia.

[February 24, 1902.]

On October 8, 1898, the appellee commenced this suit in the Circuit Court of the United States for the District of West Virginia to quiet his title to certain lands. In the bill he alleged that he was the owner in fee and in the actual possession of a large tract, known as the "Robert Morris 500,000 Acre Grant," which was granted by Virginia in 1795 to Robert Morris, of Philadelphia, and is situated partly in West Virginia, and partly in Kentucky and Virginia. He followed this general allegation with a detailed statement of his chain of title and of certain tax proceedings. After these averments, tending to show his own rights and title, he charged that Aly and Joseph Hatfield, father and son, had at different times obtained pretended titles to certain small tracts within the limits of his grant, stating how these titles were obtained and wherein he claimed they were invalid. He further averred that both the Hatfields were dead; that their only heirs were the two defendants, now appellants, the widow and daughter of Joseph Hatfield, who wrongfully claimed the tracts last mentioned and thereby cast a cloud upon the plaintiff's title. No process was issued, but on June 8, 1899, a demurrer was filed on behalf of the defendants, signed by one appearing as their attorney. This demurrer was overruled on May 16, 1900, and leave given to file answer. Thereupon, as the record states, the defendants declined to answer but elected to stand upon their demurrer, and on June 2, 1900, a decree was entered in favor of plaintiff, quieting his title to the lands claimed by the defendants. From this decree an appeal was prayed and allowed to this court, and the appeal papers were filed here on January 3, 1901.

The bill was so framed as to invite a consideration, in some aspects, of the question of forfeiture for non-payment of taxes, presented to this court in *King* v. *Mullins*, (171 U. S. 404.)

At the beginning of this term one of the appellants, Nancy C. Browning, (erroneously, as she states, called Nancy C. Rutherford in the record,) moved for a rule against the attorney who had appeared for her, to show by what authority he had assumed to so appear and why he should not be attached and his name stricken from the roll of attorneys for

falsely assuming to act as her attorney and imposing upon the circuit and this court a false, fictitious and manufactured case for the purpose of obtaining an opinion and judgment on a false statement of facts, to her injury and the injury of others similarly situated but not parties to the suit or appeal. She also asked that the alleged final decree of the Circuit Court be declared null and void, and that this appeal and the cause be dismissed. At the same time other parties, claiming to be interested in the Robert Morris tract, appeared and represented that the entire proceedings had in this case were feigned and fictitious; that the litigation on both sides was controlled by the counsel for the plaintiff King, and asked an examination as to the truth of the charge so made. A substantially similar motion was made on behalf of the State of West Virginia. The counsel named in the record have answered, denying these charges and asserting the fullest integrity in the matter. Quite a number of affidavits have been filed and also some documentary evidence presented.

Mr. Justice BREWER delivered the opinion of the Court.

It is contended by the appellants that the decree in the Circuit Court against them ought to be set aside because they have not had the hearing in that court to which they were entitled by law; that they were not served with process; that counsel unauthorized by them entered their appearance, and after having wrongfully entered their appearance failed to take the proper steps for the protection of their rights.

It is also contended (though by other parties than the appellants) that there was no real controversy between the parties nominally opposed to each other, and that the litigation was in fact carried on under the direction and control of the plaintiff. It is well settled that questions of this kind may be examined, upon motion, supported by affidavits, and that it is the duty of a court to make such inquiry, in order that it may not be imposed on by an apparent controversy to which there are really no adverse parties (*Shelton* v. *Tiffin*, 6 How. 163, 186; *Lord* v. *Veazie*, 8 How. 251; *Cleveland* v. *Chamberlain*, 1 Black, 419, 426; *Wood Paper Company* v. *Heft*, 8 Wall. 333; *Tennessee &c. Rd. Co.* v. *Southern Tel. Co.*, 125 U. S. 695; *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *California* v. *San Pablo &c. Railroad*, 149 U. S. 308.)

In *Cleveland* v. *Chamberlain*, it was said, quoting from *Lord* v. *Veazie*: "Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court."

In *Shelton* v. *Tiffin*, the question was as to the validity of a judicial sale, and it appeared that one of the defendants in the proceedings had not been served with process; that an attorney had entered an appearance for him but had done so inadvertently and without authority, and it was said: "An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property."

If it be true, as claimed by some of the moving parties, that this is a collusive suit, that there is no real controversy between the plaintiff and defendants, that the plaintiff has been controlling the litigation on both sides with a view of obtaining an opinion on a matter of law in which he is interested, the transaction is one which as stated courts of justice have always reprehended, and should be treated as a punishable contempt, and no decree entered under those circumstances should be permitted to stand.

So far as respects permitting the decree to stand, the same result would follow even though there were no collusion, if the appearance of counsel was, in fact, not authorized or ratified by the defendants; and to that matter alone shall we direct our attention.

Before any proceedings could rightfully be taken against the defendants it was essential that either they be brought into court by service of process or that a lawful appearance be made in their behalf. Confessedly they were not served with process, and they now deny the right of counsel to have entered an appearance for them. The evidence upon this, as well as kindred questions, is principally in *ex parte* affidavits. The appellants were respectively the widow and daughter of Joseph Hatfield, and claimed title to the various tracts by inheritance from him. It appears that in 1895 an action of ejectment was brought by King against several parties, these appellants among the number. Mrs. Hatfield was led to employ in that case the same counsel who entered her appearance in this. We do not stop to inquire into the circumstances which it is alleged attended that employment. She swears that it was simply for that action and a suit ancillary thereto brought to enjoin the cutting of timber; that she never employed him in any other matter, and knew nothing of the pendency of this suit until after the decree against her and the appeal to this court. She also swears that she never attempted to act for her daughter in preparing for the defense of any suit or action, or in making any arrangements for her. Mrs. Browning testifies that at the time of the ejectment suit she was the widow of John Rutherford; that on December 25, 1895, she married her present husband, Albert Browning;

that she had no notice or knowledge of the present suit, and never directly or indirectly employed or authorized any one to appear for her therein, or in any other controversy or matter pertaining to said lands; and further, never authorized any person to employ said counsel or any other attorney to appear and represent her in this suit.

On the other hand, the counsel's affidavit is that he was employed by Mrs. Hatfield in the prior action, and supposed he was authorized by the scope of that employment to appear for her in this suit; that he had the title papers of both the appellants in his possession and had no suggestion of any revocation of his authority. He introduced a copy of a letter from Mrs. Hatfield, which supported his claim of employment, at least in the ejectment case. While he testifies to having met and conversed with Mrs. Hatfield, he does not state that he ever met Mrs. Browning or had any conversation or correspondence with her, although he does state in a general way that she sanctioned and ratified the action of her mother in employing him.

We do not deem it necessary to mention all the matters of evidence, but it seems to us quite clear that, whatever may have been his understanding of the matter, the counsel was not authorized to appear for Mrs. Browning. She had in fact never employed him in any litigation in respect to these lands or otherwise, nor had she authorized any one to employ him, and she had no notice of the pendency of this suit. As to Mrs. Hatfield, while she did at one time employ him in other litigation, she knew nothing of the pendency of this suit until after the decree and the appeal, and if the employment in the ejectment action was sufficiently broad to cover all future litigation of any kind in respect to the land, it would seem to have been so only in consequence of a contract which she says was made, and which, if made, would stamp the whole transaction with wrong.

We do not stop to inquire whether the course pursued by counsel was under the circumstances the best that could have been taken for the protection of the appellants' rights. They were entitled to notice of the pendency of the suit; to select such counsel as they chose and to be guided by his advice and judgment, even though that advice and judgment should prove to be erroneous.

We have refrained from spreading upon our records a detailed statement of the charges and countercharges made in the various motions and affidavits that have been filed, and have only referred to so much as seemed necessary for the present disposition of the case. But our reticence in this respect must not be taken as expressive of a purpose to ignore them. The charges are serious ones, affecting the integrity of counsel, commended, by the fact of admission to the bar of the Circuit Court, to the confidence of the community. They involve the due administration of justice in that court and cannot be passed without notice and action. It is not enough that the doors of the temple of justice are open; it is essen-

tial that the ways of approach be kept clean. We refrain from extended comment because, as, heretofore stated, the testimony is mainly by *ex parte* affidavits, which are often, this case being no exception, quite unsatisfactory, and it is only through the sifting process of cross examination that the real facts can be disclosed. When the truth is ascertained, if there be wrongs as charged, the language of judicial condemnation should be clear and emphatic, and a punishment inflicted such as the wrongs deserve; and if no wrong has been done the conduct of counsel will be cleared from suspicion. It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross examination be had in his presence.

The order, therefore, is that this case be remanded to the Circuit Court, with instructions to set aside the decree as well as the appearance of defendants, and to proceed thereafter in accordance with law; and also to make a full investigation, in such manner as shall seem to it best, of the various charges of misconduct presented in the motions filed in this court, and to take such action thereon as justice may require.

Mr. Justice HARLAN was not present at the argument of this case and took no part in its decision.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 221.—October Term, 1901.

S. D. Hatfield and Nancy C. Rutherford, Appellants, *vs.* Henry C. King. } Appeal from the Circuit Court of the United States for the District of West Virginia.

[June 2, 1902.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

In this case a decree was entered in favor of King on June 2, 1900, in the Circuit Court for the District of West Virginia, from which an appeal was allowed to this court, and the case docketed, and the record filed, January 3, 1901. Subsequently certain motions were made, on the submission of which it was contended by appellants that the decree against them ought to be set aside because they had not had the hearing in that court to which they were entitled by law; that they were not served with process; and that counsel, unauthorized by them, had entered their appearance. The matter was submitted November 11, 1901, and decided February 24, 1902. *Hatfield* v. *King*, 184 U. S. 162. Our decree remanded the cause "to the Circuit Court of the United States for the Northern District of West Virginia, with directions to set aside the decree as well as the appearance of defendants, and to proceed thereafter in accordance with law; and also to make a full investigation, in such manner as shall seem to it best, of the various charges of misconduct presented in the motions filed in this court, and to take such action thereon as justice may require."

In the course of the opinion it was said: "It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross-examination be had in his presence."

After the case had been docketed, and on January 22, 1901, an act was approved, which divided the State of West Virginia into two judicial districts, called the Northern and Southern Judicial Districts, and provided that the District Judge of the District of West Virginia in office at the time the act took effect should be the District Judge for the Northern Judicial District of West Virginia as thereby constituted. 31 Stat. 736, c. 105.

By the eighth section of the act it was provided that causes and proceedings then pending in the courts of the District of West Virginia,

which would have been cognizable in the courts of the Northern Judicial District as created by the act, were transferred to that district; and similarly as to pending causes and proceedings falling within the new Southern District.

This proviso was added: "Provided, that all motions and causes submitted and all causes and proceedings, both civil and criminal, including proceedings in bankruptcy now pending in said judicial district of West Virginia as heretofore constituted, in which the evidence has been taken in whole or in part before the present district judge of the judicial district of West Virginia as heretofore constituted, or taken in whole or in part and submitted and passed upon by the said district judge, shall be proceeded with and disposed of in said northern judicial district of West Virginia as constituted by this act."

We think it sufficiently appears from the record that this case, when decided below, was pending in the Circuit Court of the United States for the District of West Virginia, at Charleston, in the county of Kanawha, a county included in the Southern District created by the act; and it involved lands situated in counties now in that District.

The decree entered by this court, February 24, 1902, remanded the cause to the Northern District of West Virginia, that the decree of the Circuit Court might be set aside, and certain proceedings be taken. A motion is now made to amend that decree so that the case may be sent to the Southern District, not only in respect of final hearing and decree on the merits therein, but also as to matters involved on the motions treated of in our previous opinion, which we considered it best should be passed on by the judge who rendered the original decree, the correctness of which view is confirmed by observations of counsel.

The motions were twofold, to reverse the decree and to remand the cause for further proceedings in accordance with law, and also to proceed against certain persons as for contempt of court. We concluded that an investigation ought to be had, and that it ought to take place in the court where the wrong was asserted to have been done, and before the judge who had been imposed upon, if the charges were correct, as to which we expressed no opinion. And we did not feel constrained by the terms of the act to remand the case to the Southern District; but on the contrary, as by the proviso, motions and causes submitted, in which the evidence had been taken in whole or in part, that is to say, matters *in gremio*, were to be proceeded with and disposed of in the Northern Judicial District, we regarded that proviso as broad enough to permit the course taken by us in the order made. While it may be said that a suit is pending even after decree rendered, yet the words "now pending," used in the eighth section, literally apply to cases remaining unheard and undecided, and no

particular provision was therein made in reference to cases pending on appeal. Nevertheless it is true that if there had been nothing more in this case than a decree by this court, affirming or reversing the decree below, the case would have been remanded to the district in which the property in controversy was situated, and in which the case would have been brought if the new District had then existed. But, as will have been seen, the case was not determined on its merits here, and proceedings were thought necessary to be taken independent of the ultimate disposition of the case. Therefore we entered the decree of February 24, and, upon further reflection, have concluded that it should not be amended.

Motion denied.

Mr. Justice HARLAN took no part in the consideration and disposition of this motion.

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